# Central Law Journal.

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A recent legislature of the State of New York passed what is known as the "anti-scalpers" law, which made it a criminal act for any person to sell railroad tickets in the State, unless such person is an authorized agent of the railroad companies. Soon thereafter a ticket broker of that city was arrested, convicted and sent to jail. A writ of *mandamus* was sought to compel the warden of the prison to release him from custody, which brought before the Supreme Court of New York the question of the constitutionality of the act, who unanimously decided that the law was constitutional, holding that the State, having as a sovereign power, the right to grant franches, should also have the power to protect those holding the franchises, and, therefore, refused to grant the writ. From this decision an appeal was taken to the court of appeals which has recently rendered a decision, reversing the supreme court, and holding the law to be unconstitutional. People *ex rel.* v. The Warden of the City Prison, 51 N. E. Rep. 1006. The court in terms decides that the sale of a valid passenger ticket by a broker is not a fraud, on either the transportation company or the traveler, calling for protective legislation in the exercise of the police power, as attempted by the act, that section one of the act prohibiting the sale of passenger tickets by persous not agents of the carrier, and section two, authorizing an agent of any transportation company to purchase from the agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is agent, so as to enable such passenger to travel to the place from which his ticket shall read, conflicts with Const. art. 1, § 6, providing that no person shall be deprived of liberty without due process of law; that such act is not valid as a police regulation of carriers as *quasi*-public corporations; nor is such act valid as a police regulation of the manner in which the business of ticket brokerage may be conducted; that in determining whether a law attempted to be justified as being within the police power is in violation of the constitution, the courts must ascertain whether the health, morals, safety, and welfare of the public justified its enactment; that the fact that some dishonest persons have been engaged in the ticket-brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, does not justify the legislature in depriving every citizen of the liberty to further engage in such business, as attempted by the act, and that the fact that a railroad, by a sale to a ticket broker of a block of tickets at less than the usual price, is enabled to take travel from its competitors, does not justify the legislature in prohibiting the sale of passenger tickets by other than agents of transportation companies, as attempted by the act, on the ground that such legislation is for the public good. "This is a remarkable statute," says Mr. Justice Parker, who wrote the prevailing opinion. "The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. It is asserted that the traveling public and transportation companies have been defrauded by the brokers. It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it. The sale of fraudulent tickets is a punishable offense under the Penal Code. This act, therefore, must relate to valid tickets. The legislature has not the power to interdict the sale of a valid ticket by one person to another upon the pretext that fraud will thus be prevented. Because some coal dealers and vendors in sugar cheat in weight, and dealers in paints and oils in measurements, it has not been thought proper to make it a felony for persons to engage in such business unless they have been appointed as agents by the corporations manufacturing such products." This opinion was not concurred in by all the members of the court, Justices Bartlett, Martin and Gray dissenting in vigorous opinions. Mr. Justice Martin in the course of his dissenting opinion, says: "The present statute cannot be held unconstitutional without practically determining that the affairs of this State have been controlled by statutes which were invalid, as being in excess of the powers of the legislature to enact. To hold that this act is

unconstitutional would practically annihilate the police power of the legislature." It must be evident to those who read both the prevailing and dissenting opinions that though the question is not without doubt and difficulty, the opinion of the court is not logically convincing nor in accord with the opinion of all courts of last resort which have passed upon substantially the same questions. State v. Corbett, 57 Minn. 345; Nashville, etc. Ry. Co. v. McConnell, 82 Fed. Rep. 65, 84.

## NOTES OF IMPORTANT DECISIONS.

ATTORNEY AND CLIENT — JUDICIAL SALE— PURCHASE OF CLIENT'S PROPERTY— VALIDITY. —The Supreme Court of Nebraska, in Olson v. Lamb, 76 N. W. Rep. 433, decided some interesting questions of law concerning the relationship of attorney and client. The points decided by the court briefly stated are as follows: An attorney may not purchase at judicial sale property in which his client is interested. If he do so, the client, at this election, may treat him as a trustee. But the client, by afterwards dealing with the attorney as the owner, may ratify the purchase, or estop himself from claiming the benefit thereof. If the attorney conceal from the client material facts which might affect the client's election, dealings with the attorney on the basis of the latter's ownership, but in ignorance of such facts, will not prevent the client, on learning the facts, from then enforcing the trust. A contract between two persons, whereby one of them is to bid at a judicial sale, with provisions for subsequently handling the property on behalf of both, will be upheld when the intent or effect was not to chill bids or prevent competition, but to permit a bid to be made on behalf of both, where neither could bid alone. An attorney who purchases a judgment against his client may recover thereon only the amount he paid, and not the face of the judgment. While a constructive trustee, for actual fraud, may be denied reimbursement, this rule will not be extended to a case where the circumstances raising the trust were not directly the result of the fraud. If there was fraud in collateral matters, this may be compensated in the accounting. A contract rescinded for fraud is rescinded *in toto*, and an adjustment of matters growing therefrom must proceed on both sides independent of the contract. A constructive trustee, who is charged with rents, should be credited with his reasonable expenditures, and may be allowed a reasonable compensation for managing the property. An attorney who purchases for his own benefit will not, in a suit to declare a trust, be allowed compenation for professional services in procuring the sale to be confirmed. A claim owing to a firm of which the defendant was a member cannot be set off against debts owing by the defendant individually. It appeared in this case that an attorney owned in his own right one of several liens upon property under foreclosure. A sale was had, and to procure a resale he offered to bid a certain sum. On the resale he bought for $1,000 less than his offer. To procure confirmation, he remitted $1,000 from his own lien. One of his clients held a lien of equal priority, and the bid actually made was insufficient to pay this class. It was held that on an accounting the client was entitled to such share of the $1,000 as he would have realized if the bid had been that much higher and no remittitur entered.

FIRE INSURANCE — APPLICATION—UNCONDITIONAL OWNERSHIP.—In Manchester Fire Assurance Co. v. Abrams, 89 Fed. Rep. 932, it was decided by the United States Circuit Court of Appeals, for the Ninth Circuit, that one applying for a policy of fire insurance and stating that he is the owner is bound to show only an insurable interest, if he makes no actual misrepresentation or concealment of his interest. It was further held that one has "unconditional ownership" of a crop of hay raised on his land within the conditions of a policy stipulating that it shall be void if the interest of the insured is other than "unconditional and sole ownership," when the only restriction upon his absolute right is that any excess of one-third of the proceeds over expenses shall go to the person making the crop. The court said in part: "It has been uniformly held, notwithstanding the stipulation that the policy shall be void if the interest of the insured be less than that of a fee-simple title to the land whereon the insured property is situated; that the stipulation is complied with if it appear that the insured is substantially or equitably the owner of the property, and entitled to the benefits of the same, although the title may be in another, and the insured may hold the property upon a bond for a deed only, or upon a contract for a conveyance upon which only a portion of the purchase price has been paid. Baker v. Insurance Co. (Oreg.), 48 Pac. Rep. 699; Hall v. Insurance Co. (Mich.), 53 N. W. Rep. 727; Hough v. Insurance Co., 29 Conn. 10; Insurance Co. v. Dyches, 56 Tex. 573; Insurance Co. v. Erb, 112 Pa. St. 149, 4 Atl. Rep. 8; Insurance Co. v. Staats, 102 Pa. St. 529; Insurance Co. v. Dunham, 117 Pa. St. 460, 12 Atl. Rep. 668; Dooley v. Insurance Co., 16 Wash. 155, 47 Pac. Rep. 507; Loventhal v. Insurance Co. (Ala.), 20 South. Rep. 419; Insurance Co. v. May (Tex. Civ. App.), 35 S. W. Rep. 829; Haider v. Insurance Co. (Minn.), 70 N. W. Rep. 805; Insurance Co. v. Brady (Tex. Civ. App.), 41 S. W. Rep. 513; Carey v. Insurance Co. (Pa.), 33 Atl. Rep. 185. In the case last cited, it was held that a policy providing that the insured shall be the sole and unconditional owner of the property is not void, although the insured had not paid all the pur-

chase money, had not obtained a deed, and had bought under a contract providing that failure to make payments when due should work a forfeiture of all rights thereunder. In Insurance Co. v. Brady, *supra*, it was held that there was no breach of a similar warranty from the fact that the husband had insured, as his own, furniture which belonged to his wife before their marriage, since, under the law of the State of his residence, the husband 'has the sole management and control of his wife's separate property.' In Insurance Co. v. May, *supra*, the insured was in possession of land on which she had erected improvements under a verbal contract with the owner to convey the same to her in fee-simple upon payment of the price. It was held that she was the unconditional owner of the property within the condition of a policy of insurance, providing that the policy should be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee-simple. Said the Supreme Court of Pennsylvania, in Yost v. McKee, 36 Atl. Rep. 317: 'The conditions of the policy are to be understood, not in their technical sense, but as requiring that the insured be the actual and substantial owner.'

"The cases of Noyes v. Insurance Co., 54 N. Y. 668, and Insurance Co. v. Pacaud, 150 Ill. 245, 37 N. E. Rep. 460, were very similar in their facts to the case at bar. In the Noyes case the plaintiffs had made an agreement with one Flournoy to operate a cotton plantation belonging to the latter. They were to furnish supplies and stock to the amount of $10,000, and certain implements, if needed. Flourney was to supervise the work on the plantation. The cotton crop was to be delivered to the plaintiffs at the river banks, to be transported to market, and sold. The proceeds were to go, first, to reimburse the plaintiffs for their advances; the balance was to be devided equally between them and Flournoy. The cotton was insured by the plaintiffs. The policy contained the condition that, if the insured was not the sole and unconditional owner of the cotton, the policy should be void. A portion of the insured property was consumed by fire. It was held that, as the plaintiffs had expended more than the whole crop was worth, Flournoy had no interest therein, within the spirit and meaning of the policy, and that the plaintiffs 'were the sole and unconditional owners, and entitled to recover the loss.'

"In the Pecaud case it appeared that the plaintiffs had advanced money to the firm of Million & Bott to purchase grain, and that they held warehouse receipts of the firm for their advances. Insurance was obtained upon the grain as the property of J. H. Million, with the loss payable to the plaintiffs. The policy contained the condition that, if the interest of the assured be other than sole ownership, the policy should be void. The insurance company contended that the policy was void, for the reason that the property was owned by the firm of Million & Bott, and not by J. H. Million. It appeared that, while the grain business was carried on in the name of the firm, Bott had the charge of the business at the elevator. His interest in the firm was confined to one-half of the proceeds to be realized from the business. The court said: 'Under this arrangement, Bott cannot be regarded as a real owner of the title to one-half of the grain in the elevator at the time the policy issued. His liability with Million to Pecaud & Company to hold and ship the grain to them or their order, as provided in the warehouse receipts, and his right to share in the profits on payment of his salary, may be regarded as an insurable interest in the property, upon which he could take out a policy for his own benefit. His interest in the property itself was not one which the plaintiffs were required to disclose when they took out a policy to protect their own interest.' "

## THE REMEDY OF THE HOLDER OF A LIEN UPON REAL PROPERTY, NOT IN POSSESSION OR ENTITLED TO POSSESSION, FOR WASTE.

The purpose of this article is to discover the remedy at law of the holder of a lien upon real property, not in possession, or entitled to possession, for waste committed upon the property subject to his lien. Its scope embraces any such lienholder whether his lien is created by contract, as by mortgage, in jurisdictions where the rule of the civil law and equity prevails, *i. e.*, that a mortgagee has only a lien upon the real property covered by his mortgage, or by law, as the statutory lien of a judgment creditor, or the liens of mechanics and material-men and others of like nature. The subject does not extend very far into the technical principles of the law of waste as applied by the courts between landlord and tenant, or the holder of a particular estate, as a tenant for life, tenant in dower or by the curtesy, and a remainder-man or other person having an interest in the inheritance. The acts, then, of spoil, herein designated as waste, are not such in the strict, exact sense as understood at common law. However, they are well defined as voluntary or commissive waste. But the term is employed altogether in a general sense and without any technical force, and must be understood to designate a willful act of spoliation committed wrongfully upon real property. Voluntary or commissive waste is very closely allied to

an actionable act of spoil committed by such owner or a strauger upon real property to the injury of the holder of the lien thereon. In the former case the injury measured by damages results directly to the owner by reason of the depreciation in the value of the real property effected by the waste, while in the latter case the injury measured by damages results directly to the holder of the lien by reason of the impairing of his security. None of the liens in question is a *jus in re* or a *jus ad rem*. Each rather is an incumbrance or charge upon the real property subject to it as security for the performance of an obligation and upon the existence of which it is itself dependent for existence. When, therefore, the obligation is satisfied the lien is extinguished. The principles herein sought to be elucidated have been most frequently applied between a mortgagee and the mortgagor, or his grantee or other person claiming under him. The greater frequency of occasions to invoke the aid of the courts by the mortgagee to retain the benefit of his security seems to have developed the law of the remedy in question most largely on lines touching his right. However, it will be seen, the remedy is clearly founded upon principle, and is equally available to the holder of any of the other designated liens upon real property. It is quite sufficient, as regards the form of the remedy, to say that, in jurisdictions where the common law forms of actions are recognized, the remedy in question is in form the action "on the case" or as commonly abbreviated "case," and that in jurisdictions where the reformed procedure is in use, the remedy is by an action in the nature of an action on the case at common law. But in whatever jurisdiction the remedy is sought the underlying and governing principles are not different. In considering the questions arising from the remedy of a mortgagee for injury to the real property covered by his mortgage whereby his security is impaired, it is necessary for the most part to exclude the decisions of certain jurisdictions, as therein, in order to protect him against the impairing of his security, by an injury to the real property pledged, the courts have adhered closely to the strict letter and form of the mortgage, and treated the mortgagee, to enable him to protect his interests, as an owner.[1] "In order to give him" (the mortgagee), "the full benefit of the security, and appropriate remedies for any violation of his rights, he is treated as the owner of the land."[2] "The right of the mortgagee to have his interest treated as real estate extends to and ceases at the point where it ceases to be necessary to enable him to avail himself of his just rights, intended to be secured to him by the mortgage."[3] It logically follows that in jurisdictions where the mortgagee, for the purpose of protecting and preserving his security, is treated as the owner of the real property mortgaged, he may maintain an action for an injury to the estate and recover damages measured by the extent of such injury to the property, and even though in its damaged condition it is of sufficient value to satisfy the mortgage debt, and the waste is committed by the owner of the equity of redemption.[4] The reason of the rule seems to be found in the contention that, until the whole debt is paid, the mortgagee has a right to the entire security pledged, and, if deprived of any part of it, he is entitled to full redress therefor. However, reasonable satisfaction made for the damage done to the property, to a prior mortgagee, bars an action for such damage by a subsequent mortgagee.[5] But when the action is brought by a second mortgagee against one who has damaged the mortgaged premises and therefor has made a payment to the first mortgagee, evidence is admissible to show that such damage caused to the premises was greater in amount than the payment so made, and, if so found, a recovery may be had for the difference.[6] A mortgagor in possession may also recover for the same injury in an action of trespass, by way of aggravation.[7] But it does not follow that full damages must be given to each as full satisfaction made to him who has the superior right, discharges the claims of all.[8] And in whatever form damages are recovered by the mortgagee, they arise out of and per-

[1] Gooding v. Shea, 103 Mass. 360; Byrom v. Chapin, 113 Mass. 308; Sanders v. Reed, 12 N. H. 558; Smith v. Moore, 11 N. H. 551; Hutchins v. King, 1 Wall. 54; Nelson v. Pinegar, 30 Ill. 473; King v. Bangs, 120 Mass. 514.

[2] Southerin v. Mendum, 4 N. H. 429.

[3] Ellison v. Daniels, 11 N. H. 274.

[4] See cases cited *supra* note 1. The rule of damages in Gooding v. Shea and Byrom v. Chapin is sharply criticised in Schalk v. Kingsley, 42 N. J. L. 32.

[5] Byrom v. Chapin, *supra*.

[6] Byrom v. Chapin, *supra*.

[7] King v. Bangs, *supra*.

[8] King v. Bangs, *supra*.

tain to the estate and must be applied by him in payment of the mortgage debt.[9] Evidence is also admissible in mitigation of damages to show that the mortgagee, after the alleged injury and before action brought, sold the mortgaged premises, under the power in his mortgage, for more than enough to pay his debt, and all prior incumbrances.[10] The cases cited seem to place no stress upon the question of possession or right of possession by the mortgagee. But a mortgagee who has entered into possession, his mortgage only giving him a lien upon the real property covered by it, as in California, is not invested with any other or greater right, *i. e.*, considered as a lienholder only, than he had without such entry.[11] However, the question of possession or right thereto may be of importance where the common law forms of actions are recognized, as affecting the form of action to be employed.[12] Consideration has been thus far particularly given to the principles of the decisions so far cited that it may be clearly seen that they are not based upon the reasons given for the remedy in question. Yet it is apparent that many of the principles by which they are governed are equally applicable to the right of recovery by the mortgagee in cases where his mortgage is only deemed to constitute a lien upon the premises covered by it. However, such decisions only affect a mortgagee's remedy—not the remedy of a mere lienholder. In all jurisdictions where a mortgage establishes a lien only upon, and does not vest title in the land in the mortgagee, for any purpose, the gravamen of the action by him for a willful spoliation of the mortgaged property is the injury done by the impairing or depreciation of his security. The point has been aptly stated by Withey, D. J.,[13] thus: "Whenever such is the relation of the mortgagor and mortgagee to the mortgaged property, the rule is that the mortgagee may maintain suit against one who impairs his security, and the damages are limited to the amount of injury to the mortgage as a security, however great the injury to the land may be." In the case last cited the facts were that, pending an action to foreclose his mortgage, the mortgagee accepted a quitclaim deed of the mortgaged premises from the assignee in bankruptcy of the mortgagors. The mortgaged property was found to be worth less than the amount of the lien by nearly $4,000. The defendant cut and removed timber under a license from the mortgagor, from said premises of the value of $1,300, before the plaintiff received the quitclaim deed. The mortgagee had a recovery for $1,300. The court said: "We entertain no doubt that the common law gives a remedy to the mortgagee against any one who, by an unauthorized act, has so far injured his security as that damage results."[14] The court refused to follow cases laying stress upon the intent with which the act was done.[15] In Yates v. Joyce,[16] the plaintiff was the assignee of a judgment which was a lien upon the real property in question. Execution, issued upon said judgment, was placed in the hands of the sheriff and for want of personal property from which to satisfy the judgment he sold a lot on which the judgment was a lien. Pending the levy of the execution and the sale, the defendant removed a building. There was a balance on the judgment unsatisfied after the sale of the lot. There was a demurrer to some of the counts in the declaration. The court, in giving judgment for the plaintiff upon the demurrer, says: "This appears to be an action of first impression. The books do not furnish a precedent in its favor. It is obvious, however, from the statement of the plaintiff's case in his declaration, the truth of which is admitted by the demurrer, that he has sustained damage by the act of the defendant, which he alleges was done fraudulently and with intent to injure him. * * * The plaintiff has acquired a legal lien on the property by means of the judgment in favor of Kane, and the assignment of it to himself; and the injury to the property was done with a full knowledge of the plaintiff's right." The foregoing decision was made in 1814. In Lane v. Hitchcock,[17] decided in 1817, the circumstances were one R mortgaged to L a lot of land to secure the payment of $1,001.87 by March 20, 1803, according to the condition of a bond, with the usual

[9] King v. Bangs, *supra*. See Schalk v. Kingsley, 42 N. J. L. 32.
[10] King v. Bangs, *supra*.
[11] Robinson v. Russell, 24 Cal. 467.
[12] Langdon v. Paul, 22 Vt. 205; Hagar v. Brainerd, 44 Vt. 294.
[13] Morgan v. Gilbert, 2 Fed. Rep. 835, p. 838.
[14] Morgan v. Gilbert, *supra*.
[15] Gardner v. Heartt, 3 Denio, 232.
[16] 11 Johns. Rep. 136.
[17] 14 Johns. Rep. 213.

power to sell in case of default of payment. The mortgage was assigned to Van R. Thereafter R being further indebted to Van R in the sum of $1,000, it was agreed between them that the mortgage should stand as security for both sums and a bond and securities to that effect were executed. Thereafter Van R assigned his interest in the premises and securities to the plaintiff, and, default being made in payment, the plaintiff sold the premises in November, 1815, but for less than the debt. In 1805 R had sold the defendant a part of the premises on which he erected a house and barn, and on the 4th day of May, 1815, after the mortgage was assigned to the plaintiff, took down and demolished them. The mortgaged premises was a farm, and a witness stated on the trial that it was worth $4,000. It was then offered to be proved that R was insolvent and had no other property out of which the deficiency could be satisfied, and that the defendant removed the house and barn with a view to lessen the value of the premises. The evidence was rejected and the plaintiff nonsuited. Upon a motion to set aside the nonsuit, the court said: "This case is supposed to be within the principle which governed Yates v. Joyce.[18] That came before the court on demurrer, and all the averments contained in the declaration were of course admitted. The declaration in that case averred the insolvency of the defendants in execution, * * * and that the plaintiff, by the waste committed by the defendant, was injured, and thereby deprived of recovering a part of his judgment. In the case before us, it was offered on the trial to prove that the mortgagor was insolvent and had no other property," * * * "but there was no averment in the declaration to warrant such proof. These were material and indispensable facts in order to give the plaintiff a right of action." The motion was denied. The question again came up before the court in New York in 1818, in Peterson v. Clark.[19]

This decision must have been influenced by the fact that the plaintiff alleged in his declaration that he was "seised in his demesne, as in fee," in the lands in question, whereas the evidence showed that he was only a mortgagee. The court states the question before it as follows: "Whether a mortgagee can maintain an action of waste against the mortgagor, before the forfeiture of the mortgage?" The holding is against the right. The court says: "Waste is an injury done to the inheritance, and the action of waste is given to him who has the inheritance in expectancy, in remainder or reversion; but it is expressly laid down by Blackstone, 3 Com. 225, that he who hath the remainder for life only is not entitled to sue for waste, since his inheritance may never, perhaps, come into possession, and then he has suffered no injury. So, likewise, with respect to the mortgagee, especially when the mortgage is not forfeited, his interest in the land is contingent, and may be defeated by payment of the money secured by the mortgage." The action was for cutting and removing timber, and the declaration contained a count in trover, but the court held that the mortgagee had no such interest in the timber as to sustain an action of trover. The question seems to have remained in New York as left by the decisions cited, *supra*, from that State, until 1846. In that year Gardner v. Heartt[20] came up for decision. The plaintiff was the holder of a mortgage upon a lot, but it does not appear whether or not the mortgage debt was due. The injury complained of was alleged to have resulted from the defendant's negligence, by which the earth was caused to slide upon the land mortgaged, whereby the value thereof, and of the mortgage, was destroyed. A trial was had and the verdict was for the plaintiff. The defendant moved for a new trial on a bill of exceptions. The court ordered a new trial. In the opinion, Beardsley, J., writing for the court, says: * * * "The gravamen of the action * * * was negligence, not fraud, for it is not alleged that the defendant had notice of the mortgage lien, or that he intended to do any injury whatever to the plaintiff. * * * No doubt the law will, in some cases, give redress by an action on the case to a party whose lien by mortgage or judgment has been destroyed or impaired in value; it will do so when the injury was done fraudulently, but not when it results from mere negligence and want of due care and attention." The court notices Yates v. Joyce[21] and Lane v. Hitchcock,[22]

[18] *Supra.*

[19] 15 Johns. Rep. 205, criticised in Southworth v. Van Pelt, 3 Barb. (N. Y.) 347, explained and approved in Van Pelt v. McGraw, 4 N. Y. 110.

[20] 3 Denio, 232.

[21] 11 Johns. 136.

[22] 14 Johns. 213.

and further says:[23] "The principle of these authorities decides this case. They show conclusively that without a fraudulent intention on the part of the defendant to injure the plaintiff, the action will not lie; it is not enough to prove that the act done was one of negligence and inattention. Fraud and negligence are by no means identical in their nature or effect. Fraud is a deceitful practice or willful device resorted to with intent to deprive another of his right, or in some manner to do him an injury. It is always positive. The mind concurs with the act; what is done is done designedly and knowingly. But in negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. There is, however, an absence of proper attention, care or skill. It is strictly non-feasance, not malfeasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first there is no positive intention to do a wrongful act; but in the latter, a wrongful act is ever designed and intended. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends. Negligence is evidence of fraud, but still is not fraud." There is another point in this opinion opposite to the subject in question. It is best stated in the language of the court: "The bill of exceptions does not show expressly that a bond accompanied the mortgage, but it may reasonably be inferred from what does appear, that such was the fact. As mortgagor, Day was not bound to pay the mortgage money, * * * but he had given a bond for the amount, and, therefore, was personally bound. As the plaintiff held the personal security of Day for the mortgage money, it was a material part of his right of action that Day was insolvent or unable to pay. But this was not alleged in the declaration. The judge, therefore, erred in permitting evidence to be given to show insolvency or inability. Lane v. Hitchcock, *supra*. * * * I think he (the plaintiff) cannot recover for damage done to the land mortgaged, without also alleging * * * that the defendant had acted fraudulently, and actually intended to do the injury complained of. This implies that the defendant was aware of the plaintiff's mortgage lien, * * * and designed by what was done to destroy or impair its value."[24] In Morgan v. Gilbert,[25] the court refused to follow Gardner v. Heartt, so far as it lays stress upon the intent with which the injury was committed. The insolvency of the mortgagor was patent, he being in bankruptcy, so that question was not discussed. The question again came up in Van Pelt v. McGraw,[26] and the right of the mortgagee to maintain an action on the case against the grantee of the mortgagor for wrongfully and fraudulently removing rails, timber, etc., from certain lands on which the plaintiff had a mortgage, thereby injuring his security, was sustained. The court says: "It forms no objection to this action that the circumstances of the case were novel, and that no case precisely similar in all respects had arisen." And after referring to Yates v. Joyce, Lane v. Hitchcock, and Gardner v. Heartt, and distinguishing and approving Peterson v. Clark, upon the ground that the decision turned upon the question of seisin in the mortgagee which clearly he had not, says: "Now, this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable." It had been proved that the defendants knew of the mortgage; that the mortgagors were insolvent, and that the property had been advertised for sale under the mortgage, and the defendants were forbidden to move the fences and timber, for the reason that the security would thereby be impaired. It was also proved that the value of the mortgage had been impaired by the removal. Of the refusal of the trial judge to charge that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff, the court said: "If the defendants knew that by taking off the timber the value of the plaintiff's mortgage as a security would be impaired, they would be

[23] Opinion, p. 236.

[24] Gardner v. Heartt, 1 N. Y. 528, 1 Denio, 466.
[25] *Supra*.
[26] 4 N. Y. 110.

chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequence of his acts. If, therefore, he does a wrongful act, knowing that his neighbor will be thereby injured, he is liable." The case of Van Pelt v. McGraw, is cited in Wilson v. Maltby,[27] and on its authority the court asserts that the spoliation must be made with knowledge of the lien, and with intent to injure the lienholder with respect to his security. The action was upheld in favor of an assignee in insolvency proceedings, the injury having been committed after the assignment. In Jones v. Costigan,[28] the court says "that Van Pelt v. McGraw establishes the true rule, and that where an injury is committed by the mortgagor, or others acting under his direction, knowing his insolvency and the existence of the security, and knowing that the act complained of will impair it, the action should be sustained.[29] In Jackson v. Turrell,[30] it is held clearly contrary to the great weight of authority, that a second mortgagee may maintain an action against the mortgagor or his assigns for waste resulting in an injury to the security, and constructive notice by the registration of the mortgage is sufficient notice thereof. Actual notice of the mortgage, it is held, need not be proved, nor need the plaintiff prove that the defendant acted fraudulently or with intent to injure him. Nor is the insolvency of the mortgagor a material fact. The right of lienholders, other than those already noticed, to maintain an action for a spoliation of the real property upon which the lien rests, whereby the security of the lien is injured and impaired, must clearly rest upon and be governed by the same principles. There is greater reason why the holder of a mechanic's or material-man's lien should be entitled to maintain an action at law for an injury to the property covered by his lien, whereby his security is impaired, than exists to uphold such action in favor of a judgment creditor. The lien of a judgment is general, and affects all the judgment debtor's real property, while the mechanic's lien is special, and affects only the particular property on which the work is done, or for the improvement of which the material is furnished.[31] A mechanic's or material-man's lien, in such respect, is like the lien of a mortgage. No adjudication of the exact point is found. However, it rests upon the same reasons as the cases cited, and it has been decided that the owner's free enjoyment of the property will be interfered with by injunction when his use of it tends to its injury to such an extent as to impair its value as a security.[32] And even subcontractors, it has been held, are entitled to an injunction to prevent the removal of a building which would render their security insufficient.[33] And in Royal Ins. Co. v. Stinson,[34] the Supreme Court of the United States holds that one who has a mechanic's lien on property by virtue of a contract with the owner, has an insurable interest, limited only by the value of the property and the amount of his claim.[35] The subject does not seem to require further consideration of the acts of waste entitling the holder of a lien to a recovery. In Jackson v. Turrell,[36] it is held that in case of a recovery by a lienholder, other than the first, the defendant may pay the amount of the judgment into court, and the court will exercise its equitable powers, in the distribution of the money, to the end that no injustice may be done should the first lienholder seek to recover for the same spoliation. From the foregoing collation and review of the decisions upon the question under consideration, the conclusion clearly must be: (1) That the holder of a lien, either conventional or statutory, upon real property, has a remedy at law for waste, *i. e.*, acts of spoliation, committed upon the property covered by his lien, whereby his security is impaired; (2) that the question of possession or right to possession does not affect his remedy, and, therefore, each is, as a fact, immaterial; (3) that in case the lien-

[27] 59 N. Y. 126.
[28] 12 Wis. 677.
[29] See also State v. Weston, 17 Wis. 107; Knoll v. N. Y. C. & St. L. R. Co., 1 L. R. A. 366, note; Berthold v. Fox, 13 Minn. 501; Scott v. Webster, 50 Wis. 53, 14 N. W. Rep. 280, p. 287; Atkinson v. Hewett, 51 Wis. 275, 23 N. W. Rep. 889; Tomlinson v. Thompson, 27 Kan. 70; Webber v. Pomeroy, 100 Mich. 58, 58 N. W. Rep. 625; Schalk v. Kingsley, 42 N. J. L. 32.
[30] 39 N. J. L. 329.
[31] Freeman v. Cram, 3 N. Y. 305; Lanning v. Carpenter, 48 N. Y. 408.
[32] P. & G. & A. & G. R. R. v. Spratt, 12 Fla. 26.
[33] Barber v. Reynolds, 33 Cal. 297.
[34] 13 Otto, 25.
[35] L. Ed., Book 26, p. 473.
[36] *Supra.*

holder is a mortgagee, the question of the maturity of his mortgage is not ordinarily material; (4) that when the personal responsibility of the lien debtor is pledged with the lien, his solvency is a material fact, and to entitle to a recovery, his insolvency must be pleaded and shown; (5) that it must be pleaded and shown that the defendant had knowledge of the lien, but constructive knowledge imputable from registration meets such requirement, if properly pleaded and proved; (6) that it is not, in all cases, necessary to plead and establish as a fact to the effect that the defendant intended to injure and cheat or defraud the plaintiff, but if the complaint is so drawn, the allegation is sufficiently supported, ordinarily, by the presumption that one is deemed to design the necessary consequences of his acts;[37] (7) that an injury resulting from mere negligence will not support the action; (8) that the action may be maintained against the owner of the fee of the real property upon which the lien rests, or his assigns, or against a stranger; (9) that the injury complained of must amount to a spoliation—mere acts of occupation, cultivation, or ordinary use, will not suffice; and, (10) that the damages recovered arise out of and pertain to the estate, and must be applied in payment of the debt upon which the lien depends.

GEO. W. NEWTON.

[37] Van Pelt v. McGraw, *supra*. A word of caution seems necessary here. One presumption cannot be based upon another. Hammond v. Smith, 17 Vt. 231. So the defendant's knowledge that the spoliation would impair the value of the plaintiff's security, and his intent to impair, etc., cannot both be presumed in the same case, as one seems dependent upon the other.

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TRIAL—PERSONAL INJURIES—EXAMINATION BY DEFENDANT'S SURGEON.

CHICAGO, R. I. & T. RY. CO. v. LANGSTON.

*Civil Court of Appeals of Texas, November 26, 1898.*

Where plaintiff, in an action for personal injuries, has exhibited her legs in the presence of the court, and physicians who have examined them have testified for her that she would not be able to wear artificial legs, defendant is entitled to have an examination by experts of its own selection, for the purpose of testifying on said point, though they are in its regular employment as surgeons.

STEPHENS, J.: In attempting to board one of appellant's passenger trains at Bridgeport, Tex., on the night of September 13, 1895, appellee fell or was thrown under the car, and in consequence thereof both of her feet were crushed and had to be amputated. On account of this severe injury and great loss, she recovered a verdict and judgment for $25,000, from which this appeal is prosecuted.

On the question of appellant's liability, the evidence, both as to negligence and contributory negligence, was conflicting, and that issue was fairly submitted to the jury, both in the rulings on the evidence and in the charge, though possibly there was error in permitting a certain line of argument complained of. We proceed, therefore, to consider the exclusion of certain expert testimony affecting the measure of recovery.

Upon her examination in chief, she being the first witness, appellee, after fully describing her injuries, unwrapped her injured limbs, and exhibited them in the presence of the court and jury. Just before doing so she testified: "My right leg is still sore. The other one is healed up. They are both tender. I have some little tin things that I put on my legs when I move from one place to another, and my daughter and son with me. It takes two persons to lift me. I can not bear any weight on my right leg." Here the tin things, termed "cans" by some of the witnesses, were shown to the jury, attended with an explanation of how they were worn. Just before resting her case she offered Dr. Poindexter as an expert witness, who testified: "I examined her limbs, where the amputation was performed this morning. One is partially healed, and the other is not. It is in a very irritated condition, and my notion is will probably be that way always. I do not think it will ever heal. I do not think it would be a very good idea to amputate any more. I would consider it dangerous now to her life. She cannot use artificial limbs on those stumps. You can use only on healed stumps; hers are unhealed. You could not use artificial limbs on either one of them. One looks like it has been healed. The other one never has been healed; at least, it shows places there that there might be indications of pus. It is irritated, red, and inflamed." Upon further examination, cross and redirect, his testimony tended to prove that, in his opinion, the limbs would never heal, because of "a deposit of calcine matter," and that this condition resulted from the splitting of the bones at the time of the injury; and also that, in his opinion, no harm resulted from the use of the tin cans. Appellant offered as experts in its behalf Drs. Saunders and Reily, who qualified themselves as such. Dr. Saunders testified: "I haven't examined the plaintiff in this case. Taking the plaintiff injured as she is, I think I could tell by an eximination, with reasonable certainty, whether the stubs of her limbs would ever get well enough for her to wear artificial limbs." He then proceeded to explain how an examination would enable him to determine whether artificial limbs could be worn, and stated positively that such examination would enable him

to tell whether the existing trouble was due to a diseased bone. His testimony was at variance with that of Dr. Poindexter as to the advisability and effect of wearing the tin cans. Dr. Reily had amputated the limbs soon after the accident, more than two years before the trial, and testified: "If I should examine her now, I think I could tell whether she is now able, or would at any time hereafter be able, with proper care and treatment, to wear or use artificial limbs. I advised her, while treating her, that she would be able to wear artificial limbs. I told her that she would be able to wear them in four months. * * * She moved away before the time was out."

Appellant was denied the opportunity on the trial of having these witnesses examine the injured limbs, and testify in relation thereto, as will more fully appear from the following bill of exceptions: "Be it remembered that on the trial of the above-entitled cause the defendant requested of plaintiff's counsel permission for Dr. Bacon Saunders and Dr. H. Reily, surgeons of defendant, and in defendant's regular employment, to examine the condition of plaintiff with reference to her injuries, which permission was refused by plaintiff's counsel, on the ground that said Saunders and Reily were in the employment of the defendant, and plaintiff's counsel offered to have plaintiff examined by any number of physicians the court might see proper to appoint, on defendant's application, who were not in any way connected with plaintiff or defendant; that defendant's counsel thereupon made application to the court, and requested the appointment of said Saunders and Reily to examine the plaintiff; that thereupon plaintiff's counsel made the same objection they had made to defendant's counsel, and renewed their said offer; that defendant's counsel thereupon said they would not insist upon the appointment of Dr. Reily, but would be willing for the court to appoint a commission of three physicans and surgeons to examine plaintiff, provided one of them was the said Dr. Bacon Saunders; that the reason that the defendant insisted on the appointment said Dr. Saunders was because of his known reputation as a surgeon, and because defendant's counsel did not believe that his equal was accessible to the court; that plaintiff's counsel objected to the appointment of Dr. Saunders, on the ground that he was in the employment of defendant, and had been brought here by defendant from Ft. Worth for the express purpose of testifying in its behalf, and on the ground that he might be a partisan, but stated that any three doctors or any number of doctors whom the court would regard as competent and impartial, and who were not connected, by employment or otherwise, with the plaintiff or defendant, would be acceptable to plaintiff, and plaintiff had no objection to such commission being appointed by the court to make such examination; that the court asked plaintiff's counsel if Drs. Sanders, Reily, and Stinson would be satisfactory, whereupon they objected to Drs. Saunders and Reily for the reasons stated above; that they did not know Dr. Stinson, but, if the court thought that he was competent and impartial, they did not object to him, or any number of doctors of that description; that thereupon defendant's counsel objected to the appointment of any commission unless the said Dr. Saunders was also appointed, because of his said reputation as above stated; that the court then said that he would appoint Dr. Stinson, if he was satisfactory to the parties, and he could act or not, as they saw proper; that thereupon the defendant introduced Drs. Saunders and Reily, and asked each of said witnesses if he could tell, by an examination of plaintiff's injuries, whether or not she, the plaintiff, would ever be able to use artificial limbs, which question both of said witnesses answered in the affirmative; that thereupon defendant's counsel propounded the following interrogatory to each of said witnesses separately, 'Doctor, will you please here and now examine the plaintiff and her injuries?' that plaintiff's counsel objected on the ground that said witnesses were in the employment of the railway company, and were partial, and not impartial, and that they had not been appointed by the court to make such examination, and defendant had no right to have such examination made without the consent of plaintiff, and that plaintiff was ready to submit to an examination by doctors considered by the court to be impartial and competent, and who were not in any way connected, by employment or otherwise, to plaintiff or defendant; which objection was sustained by the court, and the defendant excepted, and here tenders this its bill of exceptions, the same being No. 16. Defendant could have proved by said witnesses that plaintiff could at time wear artificial limbs without pain, and get about on them in such manner that her injuries could not be detected in her locomotion. The conversations between the court and counsel relative to the appointment of a commission, above referred to, was not in the hearing of the jury."

Dr. Stinson, being thus permitted to make an examination, did so, and was offered as a witness by appellee. After describing what his examination disclosed, he was asked: "Take that limb in its present condition, and allow it to go on without an operation, could she use an artificial limb?" to which he answered: "It is possible that a limb might be devised where the pressure would not fall on the end of the stump. It is possible to devise an artificial member where the stump would not be in contact with the limb, and it might be possible for her to wear it. If the stump should come in contact with the artificial member, she could not wear it." In the main, however, his testimony was favorable to appellee, and tender to show that artificial limbs could not be used, though not so much so as that of Dr. Poindexter. No other experts were introduced.

In this state of the record, was it material error for the court to refuse the request of appellant to have experts of its own selection examine the injured limbs so exhibited to the court and jury, and give their opinions as to whether appellee was capable of using artifical limbs? If error at all, it was clearly material. The amount of the verdict should, and doubtless would, have been materially less if the jury had believed that, instead of being a helpless cripple for life, appellee was capable of locomotion by means of artificial limbs. It is to be inferred from the record that the testimony of Drs. Saunders and Reily, if they had been permitted to make the necessary examination, would probably have been favorable to appellant. But, if not, the bill of exceptions above contains a positive statement to that effect, which we accept.

Every lawyer of experience in the trial of cases knows that experts differ widely in opinion on such matters, quite as much as experts themselves differ in reputation and skill. It is not, therefore, for the court to determine in advance what experts the jury shall believe. That is the peculiar province of the jury. The fact that Saunders and Reily were in the employment of appellant as surgeons went to the weight, and not the admissibility, or their testimony, for any relevant testimony they were capable of giving would not have been excluded upon this ground.

As this was the single specific ground of objection urged to their making an examination of the injured limbs, preparatory to giving an opinion, we come to the question, seeing that the ruling was probably prejudicial, whether the court erred in denying appellant's request for such preliminary examination. If appellee had not made profert of her injured limbs to the court and jury, the request to have experts appointed by the court to make an examination over her objection would present the question which has been repeatedly before the courts, and upon which the decisions are in hopeless conflict, so much so that judges of the same court, notably of the Supreme Court of the United States, are divided in opinion upon it. For the two opposing lines of argument, see the majority and minority opinions in Railway Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000. This court, and presumptively our supreme court, stands committed to the views expressed by the majority of the court in the Botsford case. Railway Co. v. Pendery (Tex. Civ. App.), 36 S. W. Rep. 793, in which writ of error was refused.

But, inasmuch as appellee invited an inspection and examination of her wounded limbs by making profert of them on the trial, we have finally concluded that the case presents a different question from that so often considered, and that its solution should not be influenced by our cherished Anglo-Saxon principle of personal security. In our opinion, itwould bea perversion of that principle to apply it in a case like this, where the plaintiff, unfortunate and pitiable though she be, voluntarily lays bare before the court and jury her afflicted members for the inspection and examination of the judge, jury, and advocate. For all the purposes of the trial, she thus waived her right to object, upon the ground of an invasion of her right of personal security, to a reasonable and proper examination, under the direction of the court, of the wounded parts. She thus, by her own voluntary act, conferred upon the court jurisdiction to compel what otherwise she might have refused to submit to. Having conferred the jurisdiction, she could not take it away at pleasure, without trifling with the court. It lasted as long as the trial lasted. In our bill of rights it is provided that the accused in a criminal prosecution "shall not be compelled to give evidence against himself," and yet it is held that, if he voluntarily takes the witness stand, he must submit to cross-examination.

It was not pretended that either of the experts offered was personally offensive to appellee, or that the proposed examination would be attended with danger, delay, or inconvenience even. Personal security in any form was not so much as mentioned, *eo nomine* at least, as a ground of objection. Dr. Reily, it will be remembered, amputated her limbs in the first instance. The only specific objection urged was that the proposed experts were in the employment of appellant, and might be biased. This objection, as before seen, went to the weight, and not to the admissibility, of the evidence. It is to be inferred from the record that, if this objection had been overruled by the court, the examination would readily have been submitted to then and there. We cannot, therefore, escape the conclusion that the real objection to the proposed examination was other than personal security, and hence that the numerous cases cited as authority, both in and out of this State, are not in point.

The only case cited or found that is at all parallel is that of Haynes v. Town of Trenton, 27 S. W. Rep. 622, decided by the Supreme Court of Missouri. The point decided is thus correctly stated in the eight syllabus, which seems to have been prepared by the judge: "Per Macfarlane, J. (Black, C. J., and Brace, J., concurring): Where plaintiff exhibits his injured leg to the jury on a trial as to the cause of the injury, it is error to refuse permission to the adverse party to have the leg examined in open court by experts, with a view to introduce their testimony as to the character of the injury and its probable permanency." In the course of the opinion of Judge Macfarlane, in which two of the other three judges of that division of the court seem to have concurred, and from which the remaining judge does not seem to have dissented, this language is used: "Defendant had the undoubted right, in this case, at any time after the injuries had been shown to the jury, to have physicians examine the injured leg, and testify as experts to its character and probable permanency. The question was not as to the right of defendant to have an examination

of the injuries made, but as to the right to test the effect and reduce the weight of evidence introduced by plaintiff." So we hold in the case at bar, not that the court should have appointed physicians to make an examination in the first instance, for we have no statute prescribing such procedure, but that when appellant's counsel made the following proposition, as shown in the bill of exceptions, "'Doctor, will you please here and now examine the plaintiff and her injuries?" the objection made by appellee's counsel should have been overruled, and the witnesses permitted then and there, or at such other reasonable time and place as the court might appoint, to make the proposed examination, and give the result of it to the jury. It seems to us that this would have been simple justice and consequently that it ought to have been done, thereby avoiding the appearance of an *ex parte* trial on this important issue. No harm could have resulted from such a course. Upon this ground, therefore, we feel constrained to order a reversal of the judgment.

The argument of appellee's counsel of which complaint is made was apparently of a very damaging character, in that it was calculated to arouse sympathy for appellee and prejudice against appellant. It purported, however, to be based upon facts in the record, though some of the inferences, at least, if not all, were wholly unwarranted by the facts proven, and were clothed in language calculated to substitute in the minds of the jury such inferences for facts. In view of the conclusion already reached, we need not determine whether the judgment should be reversed upon this ground, taken in connection with the large and alleged excessive amount of the verdict. Reversed and remanded.

NOTE.—It will be observed that the court, in the principal case, place their decision upon the ground that at the trial the defendant, being on the stand, made profert of her injured limbs to the court and jury, and thereby invited inspection and examination of them, and for that reason is not now entitled to claim exemption from examination as a personal privilege. Whether or not this view is correct in view of the facts and circumstances of this case, it may be said that though the authorities upon the main proposition, viz., the right to compel inspection of the body in personal injuries cases, are somewhat diverse, the courts of this country, as a general rule, in the absence of statute, are opposed to it. One of the members of the Texas court, who dissents from its conclusion, calls attention to the leading cases on the subject. In Railway Co. v. Rice, 144 Ill. 227, 33 N. E. Rep. 953, the Supreme Court of Illinois say: "The extent to which courts have gone, sustaining the power to compel such examinations, is that such orders may be made in the sound legal discretion of the trial court, when it appears that such an examination is reasonably necessary to the attainment of justice. · · · But the ruling in this case was placed upon the broad ground that the court had no power to grant the motion, and this court is committed to that doctrine." Parker v. Enslow, 102 Ill. 272; Loyd v. Railway Co., 53 Mo. 515. In Railway Co. v. Michaels, 57 Kan. 474, 46 Pac. Rep. 938, the Supreme Court of Kansas, while asserting the power of the trial court to compel a physical examination, denied it to the railway company in that case, because the application was not made until after plaintiff had closed his evidence, and, furthermore, because no necessity was shown to exist requiring such an order. In Stuart v. Havens, 17 Neb. 211, 22 N. W. Rep. 421, the same question arose, and in almost identically the same manner as here. In delivering the opinion of the supreme court of that State, Justice Maxwell said: "The plaintiff below, on his direct examination, was asked to show his arm, which he claimed was injured by falling into the excavation, to the jury. This he did without objection, and afterwards three physicians who had treated the arm professionally testified as to its condition, without objection. Afterwards the defendant below asked the court below to make an order requiring Havens to exhibit his arm to four physicians called by him (the defendant). This the court refused to do;" and error was assigned on this refusal. Discussing this assignment, the court further said: "Where, in a case like this, experts are called by a party, and permitted to make a personal examination of the person injured, and to testify therefrom, there is danger that they will feel under obligations to the party calling them, and, however honest they may be, color their testimony somewhat in his interest; while in many, if not most, cases their general views upon the question will be known to the party producing them before they are called. In any event, the evidence partakes somewhat of a partisan character. To avoid this, they should be agreed upon by the parties, or appointed by the court, and an examination, if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial." The Supreme Court of the United States, in the case of Railway Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, denied the existence of such a power in any court. Justice Gray says: "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." In Railway Co. v. Griffin, 25 C. C. A. 417, 80 Fed. Rep. 282, where the physical examination of the plaintiff was asked for during the trial, Judge Woods, in delivering the opinion of the circuit court of appeals, after citing Railway Co. v. Botsford, *supra*, says: "The reasoning of that case forbids a compulsory examination during the trial equally with one in advance of the trial." In Lyon v. Railway Co., 142 N. Y. 298, 37 N. E. Rep. 113, the court of appeals of New York, speaking through Mr. Justice O'Brien, shows that the power to compel a party to submit to personal examination by physicians exists only by virtue of an amendment to an article of their statute authorizing plaintiff's deposition to be taken, and, after citing with approval the above language of Mr. Justice Gray, he adds: "This amendment has changed the law, but it is not so certain that it will ever change the general sentiment of mankind which was expressed in Judge Gray's remarks." See, also, McQuigan v. Railway Co. (N. Y. App.), 29 N. E. Rep. 235; Roberts

v. Railroad Co., 29 Hun, 154; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. Rep. 860. In the Newmeyer case, *supra*, the Supreme Court of Indiana said: "To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether the power exists at all. So far as we know, the courts of this State have never attempted to exercise such a power, and we are of the opinion that no such power is inherent in the courts. We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of a cause. Should a litigant willingly submit, there could be no legal objection to such an examination, and should he refuse to submit to a reasonable examination his conduct might possibly be proper matter for comment; but this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers." In Mills v. Railway Co. (Del. Super. 1894), 2 Hardesty, 31, 40 Atl. Rep. 1114, it was held that, although the plaintiff had exhibited his leg for examination to physicians, he could not be compelled to expose his leg to the jury, for the purpose of explanation by one of the physicians. See 34 Cent. L. J.. 442, for exhaustive article and citation of authorities on the subject of "Compulsory physical examination in personal injury cases."

## CORRESPONDENCE.

### CONFUSION OF CATTLE.

*To the Editor of the Central Law Journal:*

Referring to the Confusion of Cattle case which, through your journal, bids fair to become famous, it seems to me that the respective rights of the drover and A in the calf depend upon whether the drover was A's agent in buying the cattle, or whether he simply bought the cattle at the request of A with the understanding that A would afterwards buy them of him. In other words, upon whether the arrangement was an agreement, on the part of A, to purchase six cattle of the drover, after the drover had gone out and purchased them himself, or whether A appointed the drover his agent to buy the cattle for him. The statement of the case is that "A, desiring six beef cattle, employed a drover to purchase the same for him. The drover sent out his buyer to purchase these six, and also to purchase six other beef cattle for the drover himself. The buyer purchased the twelve cattle according to instructions." If, by this, it is meant that A constituted the drover his agent to buy the cattle, which, I think, is fairly to be implied, the title to the cattle vested in A the moment they were bought by the drover or his buyer, who was only a subagent. The title never was in the drover. It could make no difference that the drover bought six other cattle for himself. A having employed the drover to buy the cattle, would be obliged to accept such cattle as the drover bought for him, and the drover would primarily have the right of selection of the six cattle, for A out of the twelve purchased. It would be his duty, as A's agent, to exercise the utmost good faith in making such selection. He could not profit by his agency, but if, consistently with the duty which he owed his principal, he could give him six cattle, not including the cow and calf, A would have to abide by his selection. A was entitled to the sixth animal, and the drover was bound to deliver it to him on demand. If, however, the drover refused to deliver it, A would have the right to select one of the seven. That would entitle him to the cow which had given birth to the calf, if he chose to select her, and would give him the calf for the reason that A's title vested when the drover, his agent, purchased the six cattle for him. If A had the right to insist that the cow was not to be classed as "beef cattle," as suggested by two of your correspondents, and on that ground to refuse to accept her, in case the drover offered to deliver her to him, he could waive that right if he saw fit. But he had no such right for the reason that the buyer purchased the twelve cattle "according to instructions." The cow was one of the twelve, so, for the purposes of the case, she must be treated as "beef cattle." Hence that question is not involved.

Grand Rapids, Mich. REUBEN HATCH.

### A QUESTION OF BANKRUPTCY LAW.

*To the Editor of the Central Law Journal:*

A B, two years ago, went into insolvency. All of his property was turned over to an assignee appointed by the creditors of said A B. Three meetings were held, but A B, insolvent, did not receive his discharge because he never applied for it, through no fault of his own, but to his lawyer, who did not advise him as to his rights in the matter. In Massachusetts, a man must obtain his discharge within two years, or else he cannot get it at all. The two years having expired in the case of A B, he is out of insolvency, although his estate is still in the hands of the assignee for distribution. Would it be possible now for A B to go into bankruptcy on some out of State claims, that were not proved at the former insolvency proceedings, amounting to over a thousand dollars, and when filing his list of creditors also files the names of his creditors that proved their claims at former insolvency proceedings, and obtain a discharge from them as well as from the others? In other words, would the bankruptcy court take jurisdiction of this case, and if so, and if he entered the bankruptcy court, could he get an absolute discharge from all his debts, including those who proved their claim at the former insolvency proceeding, and those who did not, leaving out the question of assent of one-half his creditors in number and amount, which in this case can probably be obtained. H. DOUGLAS CAMPBELL.

Boston, Mass.

## BOOKS RECEIVED.

The Land Registration Act of Massachusetts, Which Took Effect October 1, 1898. With an Introductory Statement, Annotations, Cross References, and Citations of Cases Bearing upon it. By Charles S. Rackemann, of the Suffolk Bar. Boston: Little, Brown & Company, 1898.

The American State Reports, Containing the Cases of Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, By A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 57. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1898.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**



1. ADMIRALTY—Shipping — Right of Passenger to Rescind Contract.—Passengers who have paid their passage on a vessel cannot be held to their contract, but are entitled to rescind and recover their passage money, where, before sailing, the vessel was reported in the press as rotten and unsafe, and they were justified by their information and her appearance in believing her so, though she may in fact have been staunch and seaworthy.—THE GUARDIAN, U. S. D. C., D. (Wash.), 89 Fed. Rep. 998.

2. APPEAL—Bills of Exceptions — Instructions.—Bills of exceptions, in a criminal case, to the giving or refusing of instructions, cannot be considered, unless they affirmatively show that they contain all the instructions.—STATE v. WINDSTANDLEY, Ind., 51 N. E. Rep. 1054.

3. APPEAL BOND—Sureties — Misrecital of Judgment.—A judgment in divorce ordered an immediate payment of $150 alimony and $50 per month thereafter. On appeal by defendant, the bond described the judgment as one for $150, but was conditioned for the payment "of said judgment rendered and to be rendered in case said appeal shall be affirmed." Held that, notwithstanding the misrecital, the judgment was sufficiently described to render the sureties liable to the amount of the bond on failure of the defendant to pay the monthly installments.—DYE v. DYE, Colo., 55 Pac. Rep. 205.

4. ASSIGNMENTS FOR CREDITORS — Attachment.—Laws 1897, ch. 334, § 3 (1 Rev. St. 1898, § 694a), providing that a levy on property of an insolvent debtor shall be dissolved, if he make a general assignment within 10 days thereafter, and the property seized shall be turned over to the assignee, impairs the obligation of contracts, as to all debts contracted prior to its enactment.—EAU CLAIRE NAT. BANK v. MACAULEY, Wis., 77 N. W. Rep. 176.

5. BENEVOLENT SOCIETY—Insurance — Non-payment of Assessment.—The by-laws of a beneficial association required all assessments to be paid on or before the last day of the calendar month in which they were made, in default of which payment a member should stand suspended; also that a suspended member, to become re-instated, must pay all sums called for before the date of re-instatement "within 60 days from the date of suspension." Held, that a member was not suspended for non-payment of an assessment until the 1st day of the month succeeding that in which it was made, and that he had 60 days, excluding that day, within which to become re-instated; and hence a member, who failed to pay an assessment made in August, by paying all arrearages on the 31st day of October following, became re-instated.—SUPREME COUNCIL AMERICAN LEGION OF HONOR v. GOOTEE, U. S. C. C. of App., Fourth Circuit, 89 Fed. Rep. 941.

6. BILLS AND NOTES — Failure of Title.—The grantee in a warranty deed retaining a vendor's lien executed a vendor's lien note, providing that, should title to the land fail before maturity, the note should be void. Held in an action on the note, that the burden was not on the payee to show that the title had not failed, but failure of title was a defense which the maker could interpose.—MEDLAN v. ABEEL, Tex., 47 S. W. Rep. 1041.

7. BROKERS—Commissions.—Evidence that a broker was acting in good faith to effect a sale of defendant's goods, pursuant to a written request so to do, and that the sale was secured through the broker's efforts, though by an agreement directly between the contracting parties, requires the submission to the jury of whether the broker has earned his commission.—BELL v. SIEMENS & HALSKE ELECTRIC CO., Wis., 77 N. W. Rep. 152.

8. BROKERS—Sales of Realty—Commissions.—A written agreement by prospective purchasers with the owner of land to purchase it for a stated price is not sufficient proof, in an action by a real estate broker for his commission, that he procured purchasers, since that agreement is conclusive only between the parties to it.—FOLINSBEE v. SAWYER, N. Y., 51 N. E. Rep. 994.

9. BUILDING ASSOCIATIONS—Sales under Trust Deed.—A building and loan association, through its treasurer as trustee of a trust deed, on default of the grantor, purposely advertised the sale in an obscure weekly paper, according to its practice for some time, so as to escape the observation of attorneys who, according to the association, made a practice of getting members to bring injunction suits against it. The general custom was to advertise such sales in the daily papers of city where the property to be sold was located. The owners were not present at the sale, and knew nothing about it. The property was bid in by the association at a third of its value. Held, that the sale should be set aside for fraud.—STEWART v. HAMILTON BLDG. & LOAN ASSN., Tenn., 47 S. W. Rep. 1106.

10. CHATTEL MORTGAGES—Confusion of Goods.—A chattel mortgage covered 2,000 sheep and the increase thereof. Five hundred wethers, part of the flock, were, with the mortgagee's consent, exchanged for 500 ewes, which were commingled with the remaining 1,500, and could not thereafter be distinguished therefrom. Held, that mortgagee's right to the 500 ewes was merely an equitable one, which could not affect the rights of creditors of the mortgagor to attach them before the mortgagee had taken possession.—ALFERITZ v. PERKINS, Cal., 55 Pac. Rep. 149.

11. CHATTEL MORTGAGES — Conversion — Parties.—A chattel mortgagee may join the mortgagor with persons who had converted the mortgaged property to their own use, in an action to recover the amount of the mortgage.—COBB v. BARBER, Tex., 47 S. W. Rep. 963.

12. CHATTEL MORTGAGES — Description.—As between the original parties to a chattel mortgage, and between

the mortgagee and the mortgagor's successor in interest with notice, parol evidence is admissible to identify the property intended to be given as security.—REINSTEIN v. ROBERTS, Oreg., 55 Pac. Rep. 90.

13. CHATTEL MORTGAGE—Foreclosure.—One who purchases personal property from an assignee in insolvency proceedings, subject to a mortgage placed on the property by the insolvent prior to the assignment, cannot avoid such mortgage upon the ground that it was fraudulent as to the insolvent's creditors.—OLSON v. HANSON, Minn., 77 N. W. Rep. 231.

14. CONTRACTS—Statement of Quantity.—In the construction of a contract of sale which specifies the quantity of the article or thing sold, such specification will be regarded as material and determinative, notwithstanding its qualification by "more or less" or "about," unless it is apparent or fairly inferable from other parts of the contract that a particular lot of goods was intended to be sold, or enough thereof to satisfy a particular need, without regard to the precise quantity, and that the specification is merely an estimate of the probable quantity thereof.—UNITED STATES v. PINE RIVER LOGGING & IMPROVEMENT CO., U. S. C. C. of App., Eighth Circuit, 89 Fed. Rep. 907.

15. CORPORATION — Assignment—Preference.—Where a corporation, in making an assignment for benefit of creditors, prefers certain *bona fide* indebtedness, evidenced by notes upon which one of its officers, a minority stockholder, was an accommodation indorser, and it appears from the evidence that the result would have been the same even if such indorser had voted against the preference or the assignment, the preference is not in violation of the statute, and does not constitute fraud in law.—WELLS, FARGO & CO. v. GEORGE M. SCOTT & CO., Utah, 55 Pac. Rep. 81.

16. CORPORATIONS—Bona Fide Subscription — Estoppel.—Unless the transaction shows a contrary intent, a subscription for stock of a proposed corporation, made (by authority of the stockholders) by the subscriber as trustee for the corporation, binds the subscriber, though it does not bind the corporation.—JOHNSTON v. ALLIS, Conn., 41 Atl. Rep. 817.

17. CORPORATIONS—Creditors — Stockholders.—Stockholders to whom all the assets of the corporation have been distributed as dividends may be compelled to refund to creditors of the corporation.—GRANT v. SOUTHERN CONTRACT CO., Ky., 47 S. W. Rep. 1091.

18. CORPORATION — Dissolution—Quo Warranto.—An information, in the nature of a *quo warranto*, to dissolve a corporation, under Rev. St. 1894, § 1145 (Horner's Rev. St. 1897, § 1131), providing that such information may be filed against a corporation where it does or omits acts amounting to a forfeiture of its rights as a corporation, or when it exercises powers not conferred by law, which fails to allege that defendant is a corporation incorporated under the laws of the State, is fatally defective on demurrer, since that fact cannot be presumed.—SNYDER v. CITIZENS' GAS & OIL MIN. CO., Ind., 51 N. E. Rep. 1067.

19. CORPORATION—Foreign Corporation—Right to Do Business.—In an action brought by a foreign corporation in a court of this State, it is not incumbent upon such corporation to show that it has complied with our statutes, and has obtained a certificate of authority to transact business within our borders. Non-compliance with the law in reference to obtaining such a certificate is a matter of defense.—LANGWORTHY v. GARDING, Minn., 77 N. W. Rep. 207.

20. CORPORATIONS — Insolvency — Preference of Officers.—An officer of a corporation that was never in a condition to pay its debts in full cannot prefer himself a creditor, as against the general creditors, by giving a mortgage to his wife on the property of the corporation.—ROWE v. LEUTHOLD, Wis., 77 N. W. Rep. 153.

21. CORPORATIONS—Insurance Companies—Powers—Building and Loan Associations.—A corporation organized under Rev. St. 1894, § 4895 (Rev. St. 1881, § 3763; Acts 1865, p. 114), authorizing the formation of corporations for insuring the lives or health of persons, has no power, either express or implied, to transact the business of a building and loan association.—HUTER v. UNION TRUST CO., Ind., 51 N. E. Rep. 1071.

22. CORPORATIONS—Managers—Authority.—A general manager of a corporation will not be presumed to have power to grant an easement or give a license in the corporation's land.—BUTTE & BOSTON CONSOL. MIN. CO. v. MONTANA ORE PURCHASING CO., Mont., 55 Pac. Rep. 112.

23. CORPORATIONS—Paid-up Stock—Rights of Creditors.—Where property is honestly and in good faith exchanged for the stock of a corporation, the stock is full-paid, as to all the world, even though the property is not equal to the par value of the stock; but if the property is fraudulently and substantially overvalued, for the purpose of imposing on the business public, the stock is not full-paid as to creditors.—NATIONAL BANK OF MERRILL v. ILLINOIS & W. LUMBER CO., Wis., 77 N. W. Rep. 185.

24. CORPORATIONS—Suit by Stockholder for Dissolution.—In a suit by a stockholder against the corporation and other stockholders and directors to wind up and liquidate the affairs of the corporation on the ground of its insolvency, an injunction was issued restraining the corporation from making a threatened sale of its property. Notwithstanding such injunction, the corporation sold and conveyed its property to other defendants, who were stockholders and in control of its affairs, for an inadequate consideration. On a showing of such fact, the court set aside the sale, and ordered the property reconveyed. The grantee reconveyed the property, but on the same day took a mortgage from the corporation thereon. Held, that such facts justified the court in finding that the action of the defendants was in pursuance of a fraudulent scheme to give a preference, and to defeat the distribution of the property by the court according to law in the pending suit, and in setting aside the mortgage, and refusing to decree a lien on the property in favor of the mortgagee for the amount paid by him on the previous sale.—GRANT v. LOWE, U. S. C. C. of App., Eighth Circuit, 89 Fed. Rep. 881.

25. CRIMINAL EVIDENCE—Confessions.—A written confession by an accused while under arrest, where no threats or inducements were held out to him at the time, and after he had been cautioned that any statement he might make might be used against him, would be admissible as a declaration against his interest, although inducements had been held out to him by another officer while previously in his charge; but the jury, in determining its weight, should consider the circumstances leading up to it.—STATE v. WILLIS, Conn., 41 Atl. Rep. 820.

26. CRIMINAL LAW—Character.—Where accused has offered no evidence of character, an instruction that an accused's character cannot be assailed, unless he himself has put it in issue by calling witnesses in its support, is erroneous, as raising the inference that the people, had they been permitted, might have shown that accused's character was bad.—PEOPLE v. GLEASON, Cal., 55 Pac. Rep. 123.

27. CRIMINAL LAW—Cruelty to Animals.—Where one was tried for cruelty to a sick horse while transporting it to his home, and he contended it was his purpose to cure it, an instruction that a person's motive in inflicting pain on an animal may be material in determining his guilt, and that severe pain, inflicted for a lawful purpose and with justifiable intent, does not come within the statute, was properly refused, since it was calculated to make the verdict turn on the question whether he intended to cure the horse, and not on whether he was cruel in the transportation.—COMMONWEALTH v. MAGOON, Mass., 51 N. E. Rep. 1082.

28. CRIMINAL LAW—Degree of Proof.—An instruction that if defendants were not present at the time it "was alleged or proven that the crime was committed, and did not aid or abet in its commission," they should be

found not guilty, is erroneous, as assuming a crime proven.—PEOPLE v. ROBERTS, Cal., 55 Pac. Rep. 137.

29. CRIMINAL LAW — Principals — Homicide.—Pen. Code, art. 75, providing that a person encouraging another in the commission of an offense is a principal, does not preclude a conviction of such person of a different degree of the offense than that which the other is guilty of, where the intent of each was not the same.—RED v. STATE, Tex., 47 S. W. Rep. 1003.

30. CRIMINAL LAW—Variance.—Where an indictment charges larceny from "Frank" A, and the evidence shows the larceny to have been from "Franklin" A, it cannot be presumed that the names apply to the same person; and, in the absence of testimony showing such fact, the variance will be fatal.—STATE v. MCEWEN, Ind., 51 N. E. Rep. 1053.

31. CRIMINAL LAW—Witnesses—Husband and Wife.—Where two men are indicted for the same offense, and there is an agreement between the district attorney and one of them that his case is to be dismissed, the wife of the latter is competent to testify for the State in the prosecution of the other.—RIOS v. STATE, Tex., 47 S. W. Rep. 987.

32. CRIMINAL PRACTICE—Arson—Indictment.—Under Rev. St. 1889, § 3511, providing that the burning of "any dwelling in which there shall be at the time some human being" is arson in the first degree, and section 3512, providing that "every house, prison, jail," etc., shall be deemed a dwelling house, an indictment for arson in the first degree, charging defendant with burning a jail, which fails to allege that it is a dwelling house, is fatally defective.—STATE v. WHITMORE, Mo., 47 S. W. Rep. 1068.

33. CRIMINAL PRACTICE — Forgery—Indictment.—An indictment for forging a bill of lading, which charges that defendant made a false instrument, purporting to be "the act of one P, Agt., the said false instrument being made in such way that the same, if it were true, would have created a pecuniary obligation on the part of" a railroad company, but which does not allege that said P was the agent of said company, is insufficient to admit proof of such agency.—BEASLEY v. STATE, Tex., 47 S. W. Rep. 991.

34. DECEIT—False Representations—Corporate Bonds.—A statement in a bond was that it was secured by first mortgage on all the corporation's property, rights and franchises. One seeking to sell it falsely stated that it was secured by a mortgage of realty of half a million in value. Held, that there was no contradiction preventing the buyer from recovering as for deceit, though he knew the contents of the bond.—WHITING v. PRICE, Mass., 51 N. E. Rep. 1084.

35. DECEIT—Sale of Land—Damages.—A vendee who relies upon the false representations of the vendor that a creek bordering the land sold had no tendency to overflow its banks is not chargeable with contributory negligence in failing to take precautions to prevent loss from a flood.—OAKES v. MILLER, Colo., 55 Pac. Rep. 193.

36. DEEDS—Delivery.—Where a grantor parts with all control over his deed when he delivers it to a third person for delivery to his grantee on the grantor's death, the conveyance takes immediate effect, and vests in the grantee title to commence after the grantor's death, but otherwise it does not.—GRIFFIS v. PAYNE, Tex., 47 S. W. Rep. 973.

37. EASEMENT — Right of Way — Prescription.—The running of the statute, so as to give by prescription a right of way across a railroad, is interrupted by the company obstructing the opening through its fence, though the obstruction is torn down soon after.—BRAYDEN v. NEW YORK, N. H. & H. R. Co., Mass., 51 N. E. Rep. 1081.

38. ELECTIONS—Conventions — Injunction.—As controversies over nominations for subordinate positions on an official ballot may be determined independently of any action of the State conventions, an injunction to restrain such controversies cannot issue in a controversy involving the action of the State convention.—WHIPPLE v. STEVENSON, Colo., 55 Pac. Rep. 188.

39. ELECTIONS—Conventions—Nominations.—A nominee of a convention held in 1898 pursuant to a call issued by the chairman of the district central committee of a congressional district, which was issued by authority of the committee of which he was chairman—he being elected such chairman in 1896 by the regular convention of the Silver Republican party—is entitled to the name and emblen of the Silver Republican party.—WHIPPLE v. HARTZELL, Colo., 55 Pac. Rep. 186.

40. ELECTIONS—Nominating Convention.—The votes of delegates to a party convention from a precinct established by the committee of such party, to give the residents thereof representation in its convention, cannot be excluded because it was not a voting precinct established by the board of county commissioners, since such committee, authorized to apportion delegates to its party convention, had a right to establish such precincts as it saw fit.—CAPPS v. KRIER, Colo., 55 Pac. Rep. 166.

41. ELECTIONS—Nomination for Congress—Certificate.—In deciding on the regularity of certificates of nomination for congress offered to the secretary of state to be filed, the usage of a party in nominating its candidates, viz., by the formation of district conventions at a State convention by the delegates thereto, in accordance with the call of the State central committee, will be recognized as decisive in favor of a candidate thus nominated against one nominated by delegates in a district convention organized and conducted independent of the State convention.—SPELLING v. BROWN, Cal., 55 Pac. Rep. 126.

42. ELECTIONS — Political Convention — Change of Principles.—The action of a regular convention of the delegates of a political party, with respect to party policy and principles, is not subject to the jurisdiction of the court, in the absence of proof that the convention was improperly influenced, or that its delegates were not members of the party holding the convention.—WHIPPLE v. BROAD, Colo., 55 Pac. Rep. 172.

43. ELECTIONS—Political Conventions—Nominations.—Members of a convention of a political party meeting at a day to which the convention was adjourned, may revoke a nomination made at a prior meeting, though their number is less than a majority of those who made the nomination.—PHILLIPS v. SMITH, Colo., 55 Pac. Rep. 177.

44. EMINENT DOMAIN—Consequential Damages.—In the absence of a statute requiring the payment of damages to property where no part of it is taken, as a condition of the exercise of the right of eminent domain to acquire property for public use, such injuries are deemed purely consequential and *damnum absque injuria*.—KUHL v. CHICAGO & N. W. RY. CO., Wis., 77 N. W. Rep. 155.

45. EVIDENCE—Expert Evidence.—The opinion of an expert witness as to the cause of an accident is incompetent when it is based upon the existence of certain facts and conditions at the time of the accident, of which he has no personal knowledge, and has not heard all the evidence in the case, unless the opinion is elicited by a question entirely hypothetical in form.—BERGEN COUNTY TRACTION CO. v. BLISS, N. J., 41 Atl. Rep. 837.

46. EXECUTION—Lien.—Lands purchased through an agent who took the title in his own name, without the principal's knowledge or consent, and then conveyed to her, are not thereafter subject to execution on a prior judgment against the agent, he never having had any interest therein.—DIMMICK v. ROSENFELD, Oreg., 55 Pac. Rep. 100.

47. EXECUTION—Supplementary Proceedings.—Code Civ. Proc. § 2464, providing for the appointment of a "receiver of the property of the judgment debtor," does not invest the receiver with a right of action against the judgment debtor and his fraudulent transferee of chattels for conspiring thus to defeat the judgment creditor, where the transfer of the chattels was

complete before the judgment was entered, for that right of action accrues, if at all, to the judgment creditor, and not the judgment debtor.—WARD v. PETRIE, N. Y., 51 N. E. Rep. 1002.

48. FRAUDS, STATUTE OF—Parol Contract.—Defendant verbally promised the owner of a dower interest in land about to be judicially sold that he would bid it in, and reconvey it to her. After the sale, he accepted from her the amount of the bid, and deposited it with his other moneys, and permitted her to pay taxes, insurance and interest, and to make repairs, but afterwards refused to reconvey it. Held, that there was such a part performance as took the contract out of the statute of frauds; and hence equity would compel him to reconvey, under 2 Rev. St. (1st Ed.) p. 135, § 10, authorizing enforcement of parol contracts partly performed.—CANDA v. TOTTEN, N. Y., 51 N. E. Rep. 989.

49. FRAUDULENT CONVEYANCES—Deed to Wife.—Under the law as it existed in North Carolina prior to the adoption of the constitution of 1868, by which a husband was vested with the ownership of the personal property of his wife which came into his possession, but not with her realty, money which was given to a husband by his wife's father, to be invested in land for the wife, was clothed with a trust, and did not become the husband's property; and a resulting trust arose in favor of the wife in the land when purchased, though title was taken in the husband, who paid a part of the purchase money, which interest of the wife was a sufficient consideration to support a subsequent conveyance to her by her husband of other property.—VOORHEIS v. BLANTON, U. S. C. C. of App., Fourth Circuit, 89 Fed. Rep. 885.

50. GARNISHMENT.—A real estate broker's commission, though the amount thereof be not specifically agreed on, is susceptible of definite ascertainment, and hence may be the basis of garnishment.—AUSTIN NAT. BANK v. BERGEN, Tex., 47 S. W. Rep. 1037.

51. GARNISHMENT—Equitable Lien.—The service of garnishee process creates an equitable lien upon property of the principal defendant in the hands of the garnishee, entitling the plaintiff to hold such property for the satisfaction of his claim against such defendant and to follow it into the hands of those who may purchase the same of the garnishee with notice of the situation, unless the lien be waived by plaintiff's conduct.—MAXWELL v. BANK OF NEW RICHMOND, Wis., 77 N. W. Rep. 149.

52. GUARANTY—General or Special.—Defendants executed a guaranty to a bank which recited that, in consideration of one dollar and of the granting of credit and discount by the bank to the F Co. (in which defendants were heavy stockholders), they guarantied the payment of all indebtedness now due, or hereafter to become due, to the bank or "its assigns," occasioned by any act of the F Co. Afterwards the F Co. discounted the notes of third persons at the bank, which subsequently transferred the notes to plaintiffs. Held, that the guaranty was general, and inured to the benefit of plaintiffs.—TIDIOUTE SAV. BANK v. LIBBEY, Wis., 77 N. W. Rep. 182.

53. HUSBAND AND WIFE — Community Property.—Though it be shown that one had authority, as agent for his wife, to receive payment on a note given her, it cannot, in the absence of evidence as to when the note was given relative to their marriage, or other evidence of its being community property, be held such, so as to authorize the off-setting against it of the bar bill incurred by the husband at the saloon of the maker of the note.—BUNKER v. HATTRUP, Wash., 55 Pac. Rep. 122.

54. HUSBAND AND WIFE—Deed to Wife.—The amendment of Civ. Code, § 164, which provided that a deed to a married woman would be presumed to have vested title in the marital community, and that this presumption could only be overcome by clear and satisfactory evidence, so as to provide that the presumption in such cases is that the title is thereby vested in the wife, as her separate property, does not apply to conveyances made before the amendment went into effect.—LEWIS v. BURNS, Cal., 55 Pac. Rep. 132.

55. HUSBAND AND WIFE—Judgment—Satisfaction.—For a gift by husband to wife, by improvements on her separate property with community money, to be reached by a person who has obtained a judgment against him and others, it must be shown, not only that the judgment creditor was his creditor at the time of the gift, and that the indebtedness still exists, but that the gift was fraudulent, and stood in the way of collection of the judgment; all the judgment debtors being insolvent, and all remedy at law being exhausted.—MADDOX v. SUMMERLIN, Tex., 47 S. W. Rep. 1020.

56. INSOLVENCY—Preference.—Pub. St. ch. 157, § 33, declaring that a person who has accepted a preference "shall not prove the debt or claim on account of which the preference was made or given," does not prevent the proving of one claim merely because the claimant has been given a preference on another claim.—SMITH v. AMERICAN LINEN CO., Mass., 51 N. E. Rep. 1085.

57. INSOLVENCY — Preference of Creditors—Assignment.—A guarantor is a debtor, within Ky. St. § 1910, providing that every act done by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion of others, shall operate as an assignment of all the debtor's property.—ALLEN v. DILLINGHAM'S ASSIGNEE, Ky., 47 S. W. Rep. 1076.

58. INSURANCE—Limiting Liability.—Under Ky. St. § 700, providing that insurance companies taking fire risks on real property shall, in case of total loss, be liable for the full value fixed in the face of the policy, the insurer cannot escape liability for the full amount of the policy by limiting its liability to three fourths of the value of the property insured.—PHŒNIX INS. CO. OF HARTFORD, CONN., v. PEAK, Ky., 47 S. W. Rep. 1089.

59. INSURANCE—Transfer of Policy—Rights of Transferee.—The vendee of insured and incumbered property went into possession under an executory contract to purchase, and procured insurance thereon; and the mortgagee, without the knowledge of the vendor or vendee, caused the insurer to indorse on the policy that the vendee "is now recognized as the owner of this policy and the property mentioned as insured hereinunder," subject to the policy's conditions. Held, that the vendee did not thereby become "the insured," within conditions requiring insured's interest to be correctly stated, and avoiding the policy for other insurance procured by him without the insurer's consent.—DE WITT v. AGRICULTURAL INS. CO. OF WATERTOWN, N. Y., N. Y., 51 N. E. Rep. 977.

60. INSURANCE—Unconditional Ownership.—One has "unconditional ownership" of a crop of hay raised on his land within the conditions of a policy stipulating that it shall be void if the interest of the insured is other than "unconditional and sole ownership," when the only restriction upon his absolute right is that any excess of one-third of the proceeds over expenses should go to the person making the crop.—MANCHESTER FIRE ASSUR. CO. v. ABRAMS, U. S. C. C. of App., Ninth Circuit, 89 Fed. Rep. 932.

61. JUDGMENT — Confession by Attorney—Reinstatement.—Plaintiffs are not entitled to vacation of judgment dismissing the case, and to reinstatement of the same, on the ground of surprise and excusable neglect, where the judgment was by consent of their attorney, and the contention is that he exceeded his authority.—HAIRSTON v. GARWOOD, N. Car., 31 S. E. Rep. 653.

62. JUDGMENTS — Res Judicata.—A judgment for an administrator in an action by him under St. 1887, ch. 270, for personal injuries suffered by his intestate, is a bar to a second action by him to recover for such injuries under the common law.—CLARE v. NEW YORK & N. E. R. CO., Mass., 51 N. E. Rep. 1083.

63. LANDLORD AND TENANT — Rights against Mortgagors—Fixtures.—A lessee of mortgaged premises, who puts thereon improvements, including a building

and machinery, can hold them free of the mortgage, though the mortgagee did not join in the lease or consent to the improvements, not only under the law of fixtures, but under the provision of the lease that he should put them on, and they should remain his, with the right to remove them, unless the lessor paid for them.—BELVIN v. RALEIGH PAPER CO., N. Car., 31 S. E. Rep. 655.

64. LIBEL—Retraction — Burden of Proof.—In an action for a newspaper libel, where the defense is that the article was published in good faith, and that the defendant published a full and fair retraction, as provided by the newspaper libel retraction statute (Gen. St. 1894, § 5417), the burden is upon the defendant to establish such defense.—GRAY v. TIMES NEWSPAPER CO., Minn., 77 N. W. Rep. 204.

65. LIMITATIONS — New Promise.—A letter written by a debtor to his creditor, referring to property bought of the creditor, and requesting employment of the creditor in order that he might pay for it in work, amounts to an unqualified admission of an existing debt which the debtor desires to pay (Code Civ. Proc. § 360), and is sufficient to interrupt the running of limitations; and the suggestion of a new mode of payment, not being made as a condition of the acknowledgment, did not impair the effect of the admission, the bar of the statute then being two years remote.—SOUTHERN PAC. CO. v. PROSSER, Cal., 55 Pac. Rep. 145.

66. MANDAMUS — Judges.—*Mandamus* lies to compel the court in which a judgment was entered to determine the issue as to the ability of plaintiff in error to pay the costs of an appeal, under Rev. St. 1895, art. 1401, notwitstanding the statute provides another forum in which the issue may be tried.—COX v. HIGHTOWER, Tex., 47 S. W. Rep. 1048.

67. MASTER AND SERVANT — Fellow-servants — Negligence.—Negligence in not furnishing a railroad with sound ties, by reason whereof a brakeman was injured, cannot be attributed to the section master as a fellow-servant, it being the duty of the master, the railroad company, to furnish a safe roadbed, which it could not shift onto a subordinate as a fellow-servant.—WRIGHT v. SOUTHERN RY. CO., N. Car., 31 S. E. Rep. 652.

68. MASTER AND SERVANT — Negligence—Fellow-servants.—A gas tester, whose duty it is to ascertain the existence of any noxious gases in the mine in places where miners are required to work, and to warn them thereof, and who has no other authority, is a fellow-servant of the miners.—HUGHES v. OREGON IMP. CO., Wash., 55 Pac. Rep. 119.

69. MASTER AND SERVANT—Negligence of Fellow-servant.—Plaintiff was cleaning off a ledge after a blast, so as to make it safe for the steam drillers to resume their work. While prying out some loose fragments, an overhanging rock fell, injuring him. The master had furnished competent employees, a skillful foreman, and the necessary appliances. Held, that the negligence of the foreman in omitting to direct plaintiff to pry the overhanging rock first was the negligence of a fellow-servant, inasmuch as it formed one of the incidental details of the work, which the master had a right to intrust to the foreman.—PERRY v. ROGERS, N. Y., 51 N. E. Rep. 1021.

70. MASTER AND SERVANT — Negligence of Master.—If the master supplies proper tools and appliances for the work in which his employees are engaged, he is not liable for an injury which one of his servants receives by reason of the servant's selecting from such tools and appliances one not adapted safely to his work.—GUGGENHEIM SMELTING CO. v. FLANIGAN, N. J., 41 Atl. Rep. 844.

71. MECHANIC'S LIEN—Enforcement—Priority.—Failure to make a junior mortgagee a party to proceedings to foreclose a mechanic's lien does not affect the priority of the lien, as against such mortgage.—HUSTED v. NATIONAL HOME BLDG. & LOAN ASSN., Ind., 51 N. E. Rep. 1067.

72. MECHANICS' LIEN—Priorities — Contracts.—A requirement in a building contract of a certificate from the county clerk that no liens are unsatisfied of record, before payment thereunder, is, in the absence of more definite explanation, for the owner's protection, and not the lienors', and hence does not prevent an assignment by a contractor, of sums to become due, from operating as an equitable assignment, and giving the assignee a preference over liens subsequently filed.—BATES v. SALT SPRINGS NAT. BANK OF SYRACUSE, N. Y., 51 N. E. Rep. 1033.

73. MECHANICS' LIENS — Waiver — Unilateral Agreement.—Building contractors to whom the owner was indebted presented a receipt from a material-man for the amount due him, to which the owner objected as insufficient to release him from liens, whereupon his architect obtained from the material man a written waiver of claims for material, directed to the owner, after which the owner, relying on the waiver, paid the balance due to the contractors, who, on the same day, paid the amount to the material-man on account of what they were owing him. In an action by the material-man to enforce a mechanic's lien, held, that the waiver, as against the owner, was not void, as a unilateral agreement.—HUGHES v. LANSING, Oreg., 55 Pac. Rep. 95.

74. MORTGAGES — Costs.—A mortgage provided that the mortgagee, on foreclosure, should recover costs and counsel fees, but nowhere stated that they should be secured by the mortgage, nor provided for their payment out of the proceeds of a sale under it. Held, in foreclosure, that such costs and fees were not a lien on the mortgaged property.—RUSSELL v. FINDLEY, Cal., 55 Pac. Rep. 143.

75. MORTGAGES—Validity—Assignment for Benefit of Creditors.—If the members of a co-partnership, in good faith, solely to secure their debts to one or more, but not all, of their creditors, transfer, by bill of sale or otherwise, the firm property, reserving to themselves the right of redemption, the conveyance is not an assignment for the benefit of creditors, but a mortgage, and a valid security, except in insolvency proceedings, even though the debtors were then insolvent, to the knowledge of the mortgagees, and the transfer covers all of the co-partnership assets.—DYSON v. JOHNSON, Minn., 77 N. W. Rep. 286.

76. MUNICIPAL CORPORATIONS — Improvements—Defective Performance.—An abutting owner in a city, who is liable to pay a part of the expense of improving the avenue on which his lot fronts, is entitled to the beneficial performance of an agreement made between the city and a contractor for the improvement of the avenue; and, where the city authorities accept an imperfect or fraudulent performance of the contract, such abutting owner has a standing in equity to ask a restraint against the payment of the contract price by the city until the contract be performed, or the contractor be obliged to recover the price at law.—MCCARTAN v. INHABITANTS OF CITY OF TRENTON, N. J., 41 Atl. Rep. 830.

77. NEGLIGENCE — Independent Contractors.—One contracting to erect a building under an architect's direction, the owner reserving a right to make any deviations from the contract, is an independent contractor, for whose negligence the owner is not responsible.—FRASSI v. MCDONALD, Cal., 55 Pac. Rep. 139.

78. NEGLIGENCE—Obstruction in Highway.—Whether placing in an adjoining highway timbers removed from a railroad cattle guard undergoing repairs was reasonably necessary in the conduct of the repairs, and not an unreasonable interference with the rights of the public, was for the jury, in an action for injuries to plaintiff caused by his horses taking fright thereat.—TINKER v. NEW YORK, O. & W. RY. CO., N. Y., 51 N. E. Rep. 1031.

79. PARTNERSHIP—Agreement to Share Profits.—In an action on a contract for the sharing of profits in a transaction, plaintiff may recover on facts showing

that he is entitled to relief, although he wrongly alleged that the contract, which he correctly set out, was one of partnership.—COWARD v. CLANTON, Cal., 55 Pac. Rep. 147.

80. PARTNERSHIP—Dissolution—Rights and Liabilities of Partners.—Where one of two partners on the dissolution of their partnership retained all the assets and assumed all the firm debts, and released his copartner from any liability therefor, the relation between them became that of principal and surety, as between themselves, though both continued liable to the firm creditors; and therefore the retiring partner, as such surety, was entitled to the appointment of a receiver, in an action for his protection against such liabilities, and for the preservation of such assets from waste and misapplication, on showing that they were in danger of being dissipated by the continuing partner.—ALLEN v. COOLEY, S. Car., 21 S. E. Rep. 634.

81. PARTNERSHIP — Evidence.—The lease on an hotel provided that the lessee should pay to the lessor, as rent for the demised premises, a designated proportion of the receipts taken by the lessee at the hotel during the term, after paying current running expenses of the hotel, and also contained several provisions the apparent object of which was to secure to the lessor the rent contemplated. Held, that this instrument did not, *proprio vigore*, create between the lessor and lessee the relation of partnership in the business of the hotel, either *inter sese* or as to creditors of the business.—AUSTIN v. NEIL, N. J., 41 Atl. Rep. 834.

82. PLEADING—Non Est Factum.—Defendant pleaded as a defense to a note that it was not executed by him. Under direction of the court, issues were made as to whether defendant signed the note himself, or authorized it to be signed. Held, that the issues were not equivalent to the plea, since a party, by ratification, might be held to have executed an instrument which he never signed, or authorized to be signed.—FURNISH v. BURGE, Tenn., 47 S. W. Rep. 1095.

83. PRINCIPAL AND AGENT — Authority.—Where an agent had been acting for his principal in a locality for several months, buying cattle, and drafts drawn by him in payment thereof were honored and paid by his principal, and he had the apparent authority of a general agent, his act in purchasing cattle to be consigned to the principal, and giving a draft on him to one who had no knowledge of his limited authority, will bind the principal.—GREER v. FIRST NAT. BANK OF MARBLE FALLS, Tex., 47 S. W. Rep. 1045.

84. PRINCIPAL AND SURETY—Bond of Contractor—Procurement by Misrepresentation.—A company proposing to act as surety on the bond of a government contractor asked a firm whether they knew of any outstanding liabilities on the part of the contractor, to which the firm replied in the negative, though the contractor at the time owed money to the firm. It was partly owing to this reply that the company signed the bond. The firm thereafter supplied the contractor with materials for the work, in reliance on the security furnished by the bond, which was conditioned on full payment of work and materials. Payments were made by the contractor to the firm, nearly sufficient in amount to cover the cost of these materials, but they were applied on the pre-existing debt. Held, that the firm could not recover on the bond.—UNITED STATES v. AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY, U. S. C. C., D. (Md.), 89 Fed. Rep. 921.

85. PRINCIPAL AND SURETY—Set-off.—The surety of an insolvent principal was indebted to the principal. This action was brought to recover such debt. He pleaded in his answer that an action had been brought against him as such surety. He did not move for a stay of proceedings in this action, but went to trial without objection, and on the trial proved that he was such surety, and that said other action was pending to determine his liability as such. Held, this was no defense; that he should have moved before trial for a stay of proceedings, until his liability as surety could be determined, and he could pay, if found liable, and off-set in this action the amount so paid.—RICHARDSON v. MERRITT, Minn., 77 N. W. Rep. 234.

86. PRINCIPAL AND SURETY—Varying Terms of Contract.—Defendant became surety on the bond of a government contractor, which under the statute was conditioned for full payment by the contractor to all persons supplying lumber or materials for the work. Plaintiffs furnished materials to the contractor, and during the progress of the work were paid by him, from its proceeds, sums in excess of the value of such materials; but plaintiffs (though having knowledge of the suretyship), without notice to defendant, applied such payments upon a prior indebtedness of the contractor, and took notes from him which extended the time of payment for the materials beyond the time for completion of the contract, and until after the contractor became insolvent. Held that, as to defendant, plaintiffs were bound to apply such payments on the indebtedness arising under the government contract, and defendant was released from liability therefor.—UNITED STATES v. AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY, U. S. C. C. of App., Fourth Circuit, 89 Fed. Rep. 925.

87. RAILROAD COMPANY—Electric Railroads—Negligence.—A company operating electric street cars is not required to put up and maintain its wires so as to absolutely prevent injury to persons coming in contact with them, regardless of the care used by the company; but it is sufficient if it uses the ordinary care which a person of ordinary prudence would use under like circumstances to prevent injury.—CITIZENS' RY. CO. v. GIFFORD, Tex., 47 S. W. Rep. 1041.

88. RAILROAD COMPANY—Killing of Stock—Notice.—Rev. St. 1898, § 1816b, providing that no action against a railroad company for stock killed or injured shall be maintained unless, within one year after the event causing the damage, written notice of the claim is given to the corporation, was not complied with where no such notice was served until after judgment had been rendered in a justice's court, and the case had been appealed by the company to the circuit court.—WOOD & GUMAER MFG. CO. v. WHITCOMB, Wis., 77 N. W. Rep. 175.

89. RAILROAD COMPANY—Negligence and Contributory Negligence.—The rule of look and listen before going upon a railroad track, whether steam or electric, is inflexible, and the non-observance of it is negligence *per se;* that it is a rule of law, not a rule of evidence permitting a jury to say that there was or was not negligence where the duty was not performed.—CAWLEY v. LA CROSSE CITY RY. CO., Wis., 77 N. W. Rep. 179.

90. REPLEVIN—Abatement.—A mortgagee of goods shipped them from one town to another, billed to herself. While they were in possession of the carrier, plaintiff, who claimed the goods under a sale by the mortgagors, had the car billed to a different town, and took the station agent's receipt. As soon as the carrier learned of the mortgagee's claim, it refused to forward the goods under plaintiff's bill of lading. Held, that after this refusal the carrier was no longer plaintiff's bailee, and therefore that replevin was pending by mortgagee against the carrier would not abate plaintiff's action against the carrier.—ROBERTS v. CHICAGO & N. W. R. CO., Wis., 77 N. W. Rep. 151.

91. REPLEVIN—Chattel Mortgage.—Though there is an apparent breach of the condition as to payment in a mortgage given to secure the price of chattels, the mortgagor is not thereby devested of the legal title, so as to be precluded from maintaining replevin against the mortgagee, who has seized the goods for non-payment, where the amount unpaid is withheld as, and is at least equal to, the damages caused by the mortgagee's breach of warranty.—HENNESSEY v. BARNETT, Colo., 55 Pac. Rep. 197.

92. REPLEVIN—Sheriffs—Individual Liability.—In an action against a sheriff and his deputy, as individuals, for an unlawful seizure of property, the sheriff's successor in office is not liable so as to be properly substi-

tuted by defendants, against plaintiff's will, on the expiration of their term of office, by reason of the fact that plaintiff replevied the property and defendants seek to obtain a return by reason of their seizure, since in such case plaintiff still seeks to enforce his rights against defendants as individuals, and not as officials. —GREIG v. WARE, Colo., 55 Pac. Rep. 164.

93. RES JUDICATA—Implied Contract.—Where plaintiff recovered judgment on a complaint stating facts which he claimed brought his case within Rev. St. § 2185, permitting a recovery of double rent under certain conditions, the judgment, though erroneous, is conclusive that the action was properly brought under that section.—STATE v. HELMS, Wis., 77 N. W. Rep. 194.

94. SCHOOLS AND SCHOOL DISTRICTS—Division of Assets.—In *mandamus* by a school district, created by division of the territory formerly embraced in defendant district, to compel defendant to appoint an arbitrator to act with the superintendent of schools and an arbitrator chosen by plaintiff, in dividing the assets and liabilities between plaintiff and defendant, it is no defense that plaintiff is not legally organized, since the legality of the organization of a municipal corporation can only be attacked in a direct proceeding by the State.—SCHOOL DIST. NO. 115 v. SCHOOL DIST. NO. 54, Oreg., 55 Pac. Rep. 98.

95. TAXATION—Exemption of Capital Stock.—The exemption of the shares of stock of an incorporated company, in the hands of stockholders, from "any tax or impost whatsoever," also exempts the capital stock of the company from taxation or impost.—HANCOCK v. STATE, N. J., 41 Atl. Rep. 846.

96. TAXATION — Foreign Corporations — Capital Invested.—Accounts receivable of a foreign corporation, payable in New York, for goods sold there, are taxable in the State, as capital invested, under Laws 1896, ch. 908, § 7, subjecting capital invested in business as personal property by non-residents to taxation.—ARMSTRONG CORK CO. v. BARKER, N. Y., 51 N. E. Rep. 1043.

97. TAXATION—Liability of Sheriff's Bonds—Estoppel. —The sheriff and his bondsmen, in an action against them for the sheriff's failure to settle taxes which he has collected, are estopped to deny validity of the tax. —MCGUIRE v. WILLIAMS, N. Car., 31 S. E. Rep. 627.

98. TAXATION—Stock in Building Association.—Stock in a building association, whether paid up, prepaid, running, or otherwise, is taxable at its true cash value. —STATE v. REAL ESTATE BLDG. & LOAN FUND ASSN., Ind., 51 N. E. Rep. 1061.

99. TRUST—Parol Evidence—Statute of Frauds.—That a company directed its president as its agent to purchase land for it, and he agreed to, but subsequently purchased the land for himself, taking the deed in his own name, thereby making him a trustee for the company, may be shown by parol, the contract of agency not being within the statute of frauds.—HALSELL v. WISE COUNTY COAL CO., Tex., 47 S. W. Rep. 1017.

100. USURY — Vendor and Purchaser.—Where the amount of a loan and interest thereon for five years were added together, and separate notes aggregating the amount executed therefor, payable before the expiration of the five years, the contract was usurious.— MILLER v. FERGERSON, Ky., 47 S. W. Rep. 1081.

101. VENDOR AND PURCHASER—Constructive Fraud—Rescission of Contract.—Representations made by the vendors of real estate respecting the condition of the title, which, though innocently made, were false in fact, and were relied on by the purchaser, constituted such a constructive fraud as would authorize a court of equity to treat the deed as an executory contract to convey, and to decree the rescission thereof.—VAUGHN v. SMITH, Oreg., 55 Pac. Rep. 99.

102. VENDOR AND PURCHASER — Enforcement of Payment.—Where parties make a mutual executory contract for the sale of real estate, and the vendor covenants on his part to convey the land, and in consideration thereof the vendee promises to pay the purchase price, and there is nothing in the contract which makes it invalid or objectionable in its nature, nor in the circumstances connected with it, equity regards the vendee as the beneficial owner of the premises, even though he has not paid the purchase price; and the vendor has a right to enforce payment of the purchase money by a suit in equity against the vendee's equitable estate in the land, instead of by an ordinary action at law to recover the debt.—ABBOTT v. MOLDESTAD, Minn., 77 N. W. Rep. 227.

103. VENDOR AND PURCHASER—Infants—Ratification. —The vendee of lands in possession of a third person under a bond for deed from an infant is chargeable with notice of affirmance of the bond by the infant on coming of age.—BARLOW v. ROBINSON, Ill., 51 N. E. Rep. 1045.

104. VENDOR AND PURCHASER — Vendor's Lien.—The principle on which a vendor's lien in equity rests is one of natural justice,—that one who gets possession of the estate of another ought not, in conscience, to be allowed to keep it without paying the consideration; and the same principle equally precludes the creation of such a lien on behalf of one who, after transferring the estate, forcibly takes it back and appropriates it to his own use, thereby largely depreciating it in value.— MINAH CONSOL. MIN. CO. v. BRISCOE, U. S. C. C. of App., Ninth Circuit, 89 Fed. Rep. 891.

105. WATERS — Riparian Rights — Construction of Grant.—A conveyance by the riparian owner, granting the right to erect certain piers, booms, and assorting works in the river, construed, and held that, by necessary implication, it gave to the grantee the right to overflow the land of the grantor, so far as was necessary to the beneficial enjoyment of the right expressly granted, for the purpose for which the grant was made. —GRAVEL v. LITTLE FALLS IMP. & NAV. CO., Minn., 77 N. W. Rep. 217.

106. WILLS — Construction.—A testator devised his homestead to his two sisters as long as they should live, provided that, if either died without "legal representatives," her share should go to the survivor. Held, that by "legal representatives" the testator meant lineal descendants.—STAPLES v. LEWIS, Conn., 41 Atl. Rep. 815.

107. WILL — Devise.—Under a devise of testator's estate to his wife for the support of herself and the children of the marriage during her life or widowhood, and at her death or marriage to be equally divided among testator's "then living children," the descendants of deceased children share in the division on the widow's death.—SMITH v. MILLER'S ADMR., Ky., 47 S. W. Rep. 1074.

108. WILL — Estate Devised.—An estate in fee-simple is given O, surviving testator, by a will devising to him real estate, "to him and his heirs forever," and providing, "If O should die without leaving heirs, then I give" it to A; the death referred to being one before that of testator.—WALSH v. MCCUTCHEON, Conn., 41 Atl. Rep. 813.

109. WILLS—Legacies.—Testator bequeathed a sum of money to a son, payable out of the life estate of his wife at her death. The son died before testator's wife, but after testator. Held, that as the bequest vested at testator's death, though its payment was postponed until the wife's death, it would not lapse, but should be paid to legatee's representatives.—COOK v. HAYWARD, Mass., 51 N. E. Rep. 1075.

110. WITNESS — Transactions with Decedent.—Under section 329 of the Code of Civil Procedure, evidence concerning transactions and conversations between a witness directly interested in the result of the suit and a person deceased is incompetent, as against the latter's representatives, with certain specified exceptions. In case the evidence of the person deceased shall have been taken and read in evidence by his representatives, in regard to any transaction or conversation, then such interested witness may be examined alone in regard to the facts testified to by such person deceased. —KRONCKE v. MADSEN, Neb., 77 N. W. Rep. 202.